

<b>COMPLIANCE BOARD OPINION NO. 01-12</b>
---

June 28, 2001

*Col. Richard A. Romer, USAF (Retired)*

The Open Meetings Compliance Board has considered your related complaints that the Town Council of North Beach violated the Open Meetings Act by holding an improperly closed meeting on March 27, 2001, and by preparing minutes which misleadingly implied that the meeting had begun in open session and had been properly closed. For the reasons stated below, we are unable to find a violation of the Act on the basis of your complaint, because the underlying facts are disputed. We do find, however, that the Town Council failed to comply with the portion of the Act requiring certain information in a written statement about a closed meeting.

**I**

**Complaint and Response**

By letter of March 28, 2001, you complained that the Mayor and Town Council of North Beach had violated the Open Meetings Act by holding a closed meeting on March 27, 2001, in violation of the Act. As we understand it, your complaint is not that the meeting could not have been closed, but rather that the Act's procedures were not followed. That is, the complaint alleged that the closed session, "which lasted approximately 20 minutes, was held in the offices in the back of the Town Hall. It was not preceded by an open meeting. No motion was introduced and passed with the public present to go into Executive Session." The complaint also objected to the manner in which the meeting was scheduled and notice of it given: "Although the specifics of the meeting are being kept from the public, it appears that the general subject area being discussed was property acquisition. When asked if the subject warranted the sudden calling of the meeting, two members of the Council who attended the meeting stated that it did not and that there was no emergency which warranted an Executive Session." According to your complaint, the meeting was scheduled by the Mayor earlier that day, with notice of it having been posted on a publicly available bulletin board at a local supermarket.

In a follow-up letter dated April 26, 2001, you supplemented your complaint by noting that the Town Council had approved minutes with respect to the March 27 meeting. "The text of the minutes," you stated, "is very cleverly written to imply to the reader that an open meeting was convened by the Town Council on March 27

at which a motion was introduced to enter into Executive Session. I was in the Council Chambers at the North Beach Town Hall that evening for another unrelated meeting ..., and it is my contention that no Open Meeting was held in front of the public in the Council Chambers before the Executive Session met in the offices located in the back of the North Beach Town Hall.”

In a timely response to the complaint, Mayor Frazer and each member of the Town Council denied that the Act had been violated. According to the response, the meeting needed to be scheduled on an emergency basis “to advise the council members of quickly changing information on a piece of real estate, for which the Town had previously presented a contract. Notice was placed in Town Hall, at the post office, the local supermarket, and on the large information gateway sign at the entrance to the Town. Posting was for two days, Monday the 26th, and Tuesday the 27th.” With respect to the circumstances of the meeting itself, the Town’s response presented different facts than those in the complaint: “At 7:15 p.m., on the evening of March 27, as advertised, the council met ... briefly in open session in the council chambers, and moved, unanimously, to hold an executive session for the purpose of considering the acquisition of real property for a public purpose. Because another meeting was previously scheduled at 7:30 p.m. in the council chambers, the entire council and I adjourned to my office where the executive session was held and lasted about fifteen minutes.” Materials submitted with the Mayor and Council’s response included a written statement evidencing the closing of the March 27 meeting and minutes reflecting a motion made to close the meeting to discuss land acquisition.<sup>1</sup> In a supplementary response dated May 11, 2001, Mayor Frazer reiterated that the events on March 27 were as described in the Town’s previous letter. “Once again, I would inform you that the Town Council for the Town of North Beach did in fact meet in open session on March 27, 2001 at 7:15 p.m. This was fifteen minutes before the meeting that Mr. Romer came to observe. Mr. Romer was not in the Council Chambers when the Council voted to go into Executive Session. The minutes of the meeting are accurate.”

## **II**

### **Discussion**

In most complaints considered by this Board, those involved agree about the facts. The disagreement is over the application of the law to the facts.

---

<sup>1</sup> The minutes cite §10-508(a)(1) of the State Government Article as the basis for closing the session. This provision, however, refers to specific personnel matters. It is evident that the Mayor and Council intended to rely on §10-508(a)(3), which permits a closed session to “consider the acquisition of real property for a public purpose and matters directly related thereto.”

In this situation, unfortunately, the predicate agreement about the facts is missing. If, as the complaint contended, the Council did not properly vote to close the March 27 meeting in an open session, then the Act would have been violated. Moreover, if a public body were to approve misleading minutes, suggesting that an open session was held when in fact it was not, the approval of the erroneous minutes would constitute a separate violation of the Act. Yet, the Mayor and every member of the Council asserted that the minutes are accurate and that a vote to close the March 27 meeting was conducted in open session.

The Compliance Board has not been granted investigatory powers and cannot independently determine the facts about the procedures used to close the meeting on March 27. See Compliance Board Opinion 94-8 (October 26, 1994), *reprinted in 1 Official Opinions of the Open Meetings Compliance Board* 101. In one prior case, complainants similarly alleged that the minutes of a public body did not accurately reflect the circumstances of a meeting, and we pointed out our inability to resolve disputes of this kind. Compliance Board Opinion 99-4 (April 20, 1999), *reprinted in 2 Official Opinions of the Open Meetings Compliance Board* 43.

In this regard, however, we do take note of the well-established principle that public officials are presumed to have acted properly in carrying out their responsibilities. See *Lerch v. Maryland Port Auth.*, 240 Md. 438, 457, 214 A.2d 761 (1965). This presumption, it is true, is rebuttable if evidence to the contrary is presented. See *Eichberg v. Maryland Bd. of Pharmacy*, 50 Md. App. 189, 196, 436 A.2d 525 (1981). An individual's mere assertion, however, is not in and of itself sufficient to rebut the presumption. *Id.*

If we apply this presumption and deem the account of events presented by the Mayor and Council as accurate,<sup>2</sup> then we consider that the Council had a proper legal basis for closing the meeting. A discussion about the acquisition of real estate, presumably for a public purpose, on which the Town had previously presented a contract plainly falls within the exception in §10-508(a)(3). Moreover, the Mayor and Council were entitled to schedule a meeting whenever they considered doing so necessary for the conduct of public business. See, e.g., Compliance Board Opinion 99-3 (April 6, 1999), *reprinted in 2 Official Opinions of the Maryland Open Meetings Compliance Board* 39, 41. Finally, the posting of timely notice at various locations in the town appears to have satisfied the Act's notice requirement in §10-506(c).

---

<sup>2</sup> Although the Open Meetings Act establishes a presumption that a public body did not violate the Act in a judicial proceeding under §10-510 of the State Government Article, there is no statutory presumption applicable to complaints before the Compliance Board. See Compliance Board Opinion 00-8 (August 4, 2000), slip. op. p. 3. However, the Compliance Board will apply this principle about the actions of government officials when the relevant facts so warrant.

With respect to the procedures required prior to closing a meeting, it appears, based on the response, that the Council properly conducted a recorded vote in open session and closed the meeting only after a majority voted in favor of doing so. *See* §10-508(d)(1) and (2)(i).

We point out, however, that the written statement prepared by the Council was defective. Although it included a citation of the authority under the Act for closing the session, it did not include “the reason for closing the meeting” or “a listing of the topics to be discussed,” both of which are required under §10-508(d)(2)(ii). The two are not synonymous. *See, e.g.,* Compliance Board Opinion 97-11 (May 29, 1997), *reprinted in 1 Official Opinions of the Open Meetings Compliance Board* 245. That opinion involved, in part, the adequacy of a written statement prior to the closing of a meeting under §10-508(a)(3). Although we recognized that the public body’s statement need not reveal information harmful to the public body’s ability to complete a property transaction, we found legally defective a statement that amounted to little more than legal boilerplate: “The need for secrecy about the particulars of potential property acquisition ... does not justify the Commissioners’ failure to provide an elaboration beyond the words of the exception itself.” *1 Official Opinions* at 246. The statement prepared by the Council of North Beach does not even purport to provide a reason for closing or a summary of the topic beyond the words of the statutory exception itself. In this respect, the Act was violated.

### III

#### Conclusion

We are unable to resolve the disagreement about the facts presented in the complaint and the Council’s response. Accepting for purposes of our legal analysis the facts as presented by the Council, we conclude that (i) the Open Meetings Act was not violated by the holding of the closed session, (ii) most of the Act’s procedural requirements were met, but (iii) the written statement prepared in connection with the session did not comply with the Act.

OPEN MEETINGS COMPLIANCE BOARD

*Walter Sondheim, Jr.*  
*Courtney McKeldin*  
*Tyler G. Webb*